Filed 9/19/06 In re Eduardo G. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re EDUARDO G., JR., et al., Persons Coming Under the Juvenile Court Law.	B188636 (Los Angeles County Super. Ct. No. CK52865)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. EDUARDO G., SR., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steven L. Berman, Juvenile Court Referee. Affirmed and remanded.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Tracey Dodds, Senior Deputy County Counsel, for Plaintiff and Respondent.

Eduardo G., Sr. (appellant) and Lucia L. (Mother) are the parents of Eduardo G., Jr. (born July 2000) and Alfredo G. (born January 2003). Mother also has two other children named Claudia R. and Byron R., who are not the subjects of this appeal. Appellant contends that the juvenile court erred in denying his petition under Welfare and Institutions Code section 388[1] and in failing to inquire whether the children have any American Indian ancestry. We affirm the order denying appellant's section 388 petition and remand the matter for the juvenile court to order that the Department of Children and Family Services (Department) comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., hereinafter ICWA).

FACTUAL AND PROCEDURAL BACKGROUND

In March 2004, all four children were declared dependents of the court after the court sustained allegations that appellant had physically and sexually abused Claudia, physically abused Byron, physically abused Mother, and had a history of substance abuse. Claudia and Byron were placed with their maternal grandmother. Eduardo and Alfredo were placed in the foster home of Blanca M. Based upon the charges which led to the dependency, appellant was incarcerated.

Reunification services were ordered for both Mother and appellant. Both Mother and appellant were ordered to participate in drug counseling and testing, domestic violence counseling, parent education, and sexual abuse counseling. Appellant was ordered to participate in individual counseling. Appellant was allowed monitored visitation.

When appellant was released from jail, he was deported to Mexico. In May 2004, he told the social worker that he had recently reentered the United States and was ready to start the parenting education, drug counseling, and anger management programs. Thereafter, he stopped contacting the social worker, stopped attending all of his

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[1] All other statutory references shall be to the Welfare and Institutions Code unless otherwise indicated.

programs, and did not visit the children. On August 30, 2004, the social worker received notice that appellant had been terminated from all of the programs due to poor attendance. He failed to appear for any court dates in September 2004.

The social worker's report prepared for the November 16, 2004 hearing indicated that Mother had been living in a motel, but she had given the Department another address and denied that she was living with appellant. However, other sources indicated that Mother and appellant were living together at the motel. The social worker reported that appellant had not demonstrated any interest in regaining custody of his children or complying with court orders.

In November 2004, the court terminated reunification services as to appellant but continued them for Mother.

Mother tested positive for methamphetamines in January 2005 and did not show up for testing in November 2004, December 2004, and February 2005. It was reported that appellant was still living with Mother. The social worker's status review report prepared for the March 2005 12-month review hearing indicated that appellant had not requested visitation with his children during the 14 months they were in placement, nor had he provided the Department with his current address or proof of compliance with the court-ordered programs.

After an evidentiary hearing in April 2005, the court terminated reunification services for Mother and set an implementation hearing pursuant to section 366.26.

In May 2005, appellant contacted the social worker for the first time since May 2004. He presented papers which indicated that he was detained by Immigration and Naturalization Services from March 30, 2005, to April 29, 2005, and that he was ordered to be out of the country for the next 10 years. The social worker had also received appellant's criminal history report which reflected convictions since 1992, including burglary, robbery, spousal battery, and possession of controlled substances. He had apparently enrolled in classes for drug counseling, sexual abuse treatment, anger management, and parenting.

The social worker's report prepared for the section 366.3 (review of permanent plan) hearing on September 29, 2005, indicated that a worker at one of the counseling centers reported that appellant had become verbally aggressive with her. The report also noted that he had only three monitored visits with his children and it appeared that he was a stranger to them, especially Alfredo.

The report prepared for the section 366.26 hearing on October 24, 2005, indicated that Berta R. had been a regular babysitter for Eduardo and Alfredo at the home of Blanca M. and that the minors had a positive relationship with her. Berta R. and her husband had expressed an interest in adopting Eduardo and Alfredo. The minors' maternal grandmother, who was caring for Claudia and Byron, also expressed an interest in adopting Eduardo and Alfredo. The report also indicated that appellant had been having monitored visitation with the children, which was unpleasant, and that Alfredo did not remember him and had only limited interaction with him. Appellant brought his mother to one of the visits without prior notice and the children were reluctant to have any contact with her.

The report prepared for the continued section 366.26 hearing on January 23, 2006, indicated that appellant had visited the minors regularly for one hour per week and that Eduardo had been gradually more friendly with appellant, and Alfredo would follow his lead, but as soon as Eduardo stepped away, Alfredo would go back to his foster parent's side. Eduardo was not comfortable with any of appellant's relatives.

Appellant filed his section 388 petition on January 23, 2006, the date of the continued 366.26 hearing. Appellant's declaration stated that he had completed drug counseling, drug testing, domestic violence counseling, sexual abuse treatment, and anger management classes. The certificates attached to the petition showed, however, that he had failed to continue drug testing after July 2005, and that he had completed only the drug counseling program and parenting classes. He had merely started the domestic violence, anger management, and sexual abuse classes. At the hearing, the court stated, "The 388 is going to be denied. None of these programs are since July of 2004, including [sexual abuse treatment] . . . . There's nothing current showing he's testing or in [the

sexual abuse treatment program] or in counseling . . . ." His attorney stated that appellant had finished the drug counseling program, but the court stated, "There's no testing." The matter was then set for a section 366.26 hearing on February 8, 2006.

CONTENTIONS ON APPEAL

Appellant contends that the court abused its discretion in denying the section 388 petition without a hearing because he had substantially complied with his case plan and that he established that a change in the order was in the children's best interests. In the alternative, the court should have considered placing the minors with the paternal grandmother. He also contends that the court erred in failing to inquire of appellant whether the children had any American Indian ancestry.

DISCUSSION

A. The Section 388 Petition

A petition filed pursuant to section 388 will be granted if the petitioner establishes by a preponderance of the evidence that (1) there is a change of circumstances or new evidence and (2) the proposed change is in the child's best interests. (§ 388; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) If the parent makes a prima facie showing that a hearing on the petition would promote the best interests of the child, the court shall order a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310*; In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) A hearing need not be held if the petition, liberally construed, does not make that prima facie showing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) We review the denial of a section 388 petition for abuse of discretion. (*Ibid.*)

Once reunification services are ordered terminated, the focus shifts from the parent's interest in reunification to the needs of the child for permanency and stability. (*In re Marilyn H., supra,* 5 Cal.4th at pp. 308-310.)

Appellant was gone for most of the reunification period, and it was only after services to him were terminated that he began to show any interest in the children. The

only change in circumstances was that he had changed from being a completely absent father to one who was beginning to attempt to comply. Unfortunately, "[w]hile [the period before the section 366.26 hearing] may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate. [Citation.]" (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.)

Appellant cites *In re Hashem H.* (1996) 45 Cal.App.4th 1791, in support of his claim that the petition should be granted. In *Hashem H.*, however, the petition included evidence that the parent's mental and emotional problems which led to the removal of the child from the home had been successfully resolved through therapy and that the parent had regularly visited the child for the four years since the child had been placed. (*Id.* at pp. 1794-1796.) That is not the case here. While appellant demonstrated that he had begun to participate in counseling programs, he had not even attempted to comply with court orders until almost two years after the children had become dependents, and had not completed the programs or demonstrated that he had resolved any of his issues with substance abuse, physical abuse, or sexual abuse. Appellant's situation does not come close to that described in *Hashem H.*, but more closely resembles the situation in *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, which was cited and distinguished by the *Hashem H.* court. In *In re Baby Boy L.*, the court denied the section 388 petition stating, "[A]t the eleventh hour and the fifty-ninth minute, [mother] offered a bare scintilla of proof that she was *beginning* to rehabilitate. But '[c]hildhood does not wait for the parent to become adequate.' [Citation.] A mere prima facie showing of changing—we hesitate to say, 'changed'—circumstances was not enough to require or justify a hearing on return of the child to her after two years." (*Id*. at p. 610.)

In addition, nothing in appellant's petition supported a change of placement to the paternal grandmother. The children did not have any relationship with her, and appellant did not provide any information showing that the children would be better off with her than with their regular caretaker, or with the maternal grandmother who had been successfully caring for the other two siblings.

Appellant did not meet his burden of proving that an undoing of the prior orders was in the best interests of the children or that there had been any appreciable change of circumstances. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531.) The juvenile court did not abuse its discretion in denying the petition.

B. ICWA Inquiry

Appellant contends that the court never inquired of him whether the ICWA applied, and therefore the termination of his parental rights should be reversed. The ICWA requires that if the court knows or has reason to know that an Indian child is involved, the Department shall notify the Indian custodian and the Indian child's tribe of pending proceedings. (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 1439(f).)

The record reflects that appellant was not present at the February 23, 2004 hearing when Mother was asked if the minors had any American Indian heritage. Her counsel replied that neither Mother nor appellant did. At a hearing on February 27, 2004, appellant was present for the first time but was not asked about the children's ethnic heritage. The Department concedes this was error.

The court's failure to inquire, however, does not constitute jurisdictional error. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1409-1411.) The lack of inquiry requires only limited remand to the juvenile court to determine from appellant if the children are of American Indian heritage. If there is no indication that the ICWA applies, then the juvenile court may reinstate the order terminating appellant's parental rights. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.)

DISPOSITION

The order of the juvenile court denying the section 388 petition is affirmed and the matter is remanded to the juvenile court to order the Department to comply with the notice provisions of the ICWA. If it is determined that the children are of American Indian ancestry and the ICWA applies, appellant is then entitled to petition the juvenile

court to invalidate all orders which violate title 25 of the United States Code sections 1911, 1912, and 1913.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.